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No. 03-1039

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In *Boyde v. California*, 494 U.S. 370 (1990), Boyde argued that California's "catch-all" mitigation instruction in capital cases, "factor (k)," unconstitutionally told the jury that it may consider only mitigating evidence involving the "circumstance of the crime." *Id.* at 382. This Court disagreed, holding that factor (k) "directed" the jury "to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character." *Id.* In the instant case, the California Supreme Court concluded that factor (k) likewise directed juries to consider post-crime evidence in mitigation (such as evidence of good behavior after a defendant's arrest). The en banc Ninth Circuit disagreed and granted habeas corpus relief to Payton.

As demonstrated in the Petition, that holding violates the mandate of 28 U.S.C. § 2254(d) that federal habeas courts must defer to reasonable state court decisions. Payton's Brief in Opposition makes only passing reference to the deference standard of § 2254(d) and utterly ignores that the Ninth Circuit found objectively unreasonable the legal conclusion of seven federal judges and five state court judges. Payton instead argues that the Ninth Circuit's decision had nothing to do with its disagreement with the California Supreme Court over the meaning and adequacy of factor (k). That contention is flatly

wrong. The entire predicate of the Ninth Circuit's decision was its conclusion that factor (k) does not encompass post-crime evidence in mitigation. In granting habeas relief based on that conclusion, the Ninth Circuit has once again shown its unwillingness to abide by the limits Congress imposed on habeas corpus review in the AEDPA. Certiorari should be granted to prevent Congress's intent from being continually thwarted.

A. The Linchpin Holding Of The Ninth Circuit's Decision In *Payton* Is That, Contrary To This Court's Holding In *Boyde*, Factor (k) Is Unconstitutional As Applied To Post-Crime Evidence In Mitigation

Contrary to Payton's assertion (Opp'n at 1), the Ninth Circuit's decision granting habeas relief does not turn on the "unique" facts of Payton's case but on the Ninth Circuit's refusal to follow *Boyde*. The Ninth Circuit insists that *Boyde*'s holding, that factor (k) is facially constitutional, is limited to cases involving pre-crime evidence in mitigation. App. A at 15-16. The Ninth Circuit then finds the California Supreme Court to have been objectively unreasonable in relying upon *Boyde*'s factor (k) holding, because, under the Ninth Circuit's interpretation, "*Boyde* does not control this case" since it involves post-crime evidence in mitigation. App. A at 15. Thus, the State has accurately identified the question presented as "Did the Ninth Circuit violate 28 U.S.C. § 2254(d) when it found the California Supreme Court objectively unreasonable in holding that California's 'catch-all' mitigation instruction in capital cases is constitutional as applied to post-crime evidence in mitigation?"

In that regard, Payton's contention that the Ninth Circuit did not intend to invalidate factor (k) as applied to post-crime mitigating evidence is without merit. *See* Opp'n at 8-9. Although in this second *Payton* opinion, the en banc panel

removed its express declaration that factor (k) was constitutionally defective as applied to post-crime evidence in mitigation, it maintained virtually the identical reasoning and conclusion that factor (k) is ambiguous as applied to post-crime evidence in mitigation. *Compare* App. A at 15-17 and App. C at 58-61. The net effect of the Ninth Circuit's holding is also the same, namely, that contrary to *Boyde*, factor (k), on its face, is not constitutionally adequate under the Eighth Amendment because it does not allow for consideration of Payton's non-crime related evidence in mitigation.[1/]

As demonstrated in the State's Petition, California has it right, and the Ninth Circuit has it wrong. Under *Boyde,* factor (k) is constitutionally adequate on its face and allows for consideration of "*any other circumstance* which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Boyde*, 494 U.S. at 382 (emphasis added). "Any other circumstance," which excludes *nothing*, therefore certainly includes post-crime evidence in mitigation.

The root of the Ninth Circuit's problem is in equating this Court's explanation for why *Boyde*'s type of evidence would naturally be considered mitigating (i.e., that people who have suffered disadvantaged circumstances might be less culpable for their actions) with the Court's actual holding in *Boyde*, which is that factor (k) permits consideration of "any other circumstance which extenuates the gravity of the crime," not just circumstances related to the crime. In doing so, the Ninth Circuit improperly limits factor (k) to evidence that might provide an *excuse for the crime* rather than evidence that might "*extenuate the gravity* of the crime." App. A at 14-16 &, n.7 (emphasis added). As set forth in the Petition, evidence demonstrating remorse or rehabilitation is equally capable of

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1. Consequently, the omission of the express declaration of the unconstitutionality of factor (k) should not be viewed as an attempt at the deference called for by AEDPA but an attempt to achieve the same result notwithstanding AEDPA.

extenuating the gravity of the crime so as to justify a sentence less than death. Pet. at 16-17. Accordingly, contrary to the Ninth Circuit's decision, factor (k) is constitutionally adequate as applied to Payton's post-crime evidence of rehabilitation.

B. The Ninth Circuit Continues To Refuse To Abide By The Dictates Of AEDPA, Which Compels Respect For The California Supreme Court's Decision In *Payton*

Notably absent in both the Ninth Circuit's decision and Payton's opposition is the deference to be afforded to the California Supreme Court's decision under AEDPA. Instead, both simply conduct a *de novo* review of the facts and substitute their own, contrary, judgment. Both justify their actions under the pretense that the California Supreme Court did not consider all of the relevant facts (such as the full extent of the prosecutor's incorrect statement of law and the trial court's curative instruction), because such facts were not sufficiently detailed by the California Supreme Court in its opinion. Ironically, the Ninth Circuit majority and Payton principally rely on the facts identified by Justice Kennard, in dissent, to illustrate their point. Justice Kennard's dissent, however, only serves to confirm the full extent the justices of the California Supreme Court thoroughly hashed out these very issues. Thus, not only is the contention that the California Supreme Court did not consider all of the relevant facts contrary to the presumption that the court considered all of the record before it regardless of whether a specific portion of the record is mentioned, the contention is belied by the decision itself in *People v. Payton*, 3 Cal. 4th 1050, 839 P.2d 1035, 13 Cal. Rptr. 2d 526 (1992). App. F. This is precisely the kind of analysis the Court condemned in *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2003). It is precisely the type of analysis foreclosed by AEDPA.[2/]

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2. Similarly baseless is Payton's claim the State mischaracterized the record by not specifically referencing all of the facts. The State set forth the pertinent facts in its Petition. Moreover, the reasons for seeking certiorari do not turn on the particular facts of *Payton* but on the Ninth Circuit's repeated refusal to follow AEDPA and its refusal to follow *Boyde*. Payton's claims of mischaracterization of the record, therefore, are baseless. Opp'n at 10-13.

The critical point is, in analyzing and rejecting Payton's contention that his jury was foreclosed from considering his post-crime evidence in mitigation, the California Supreme Court made a decision that was neither "contrary to" nor an "unreasonable application of" clearly established Supreme Court precedent. Indeed, both Payton and the Ninth Circuit concede that the California Supreme Court identified the applicable Eighth Amendment Supreme Court jurisprudence, including *Boyde*, and methodically tracked each of the principles of *Boyde*. However, they find that the California Supreme Court was objectively unreasonable in doing so by concluding that *Boyde*'s holding and principles turn on the facts in *Boyde*. App. A at 15-23; Opp'n at 19. Such reasoning would render *Boyde* meaningless and would conflict with the decisions of this Court and a number of other courts who have applied *Boyde*'s analysis to a wide range of facts. *See, e.g., Weeks v. Angelone*, 528 U.S. 225, 232-33 (2000); *Buchanan v. Angelone*, 522 U.S. 269, 271, 276-79 (1998); *Ward v. Whitley*, 21 F.3d 1355, 1365-66 (5th Cir.1994).

The decision also reflects a wholesale abandonment of the deferential standard of review required under AEDPA. Rather than giving state court decisions "the benefit of the doubt," (*Williams v. Taylor*, 529 U.S. 362, 404-13 (2000)), to "ensure that state-court convictions are given effect to the extent possible under law," (*Bell v. Cone*, 535 U.S. 685, 693 (2002)), the Ninth Circuit continues to substitute its own judgment. This is amply demonstrated by the fact that the Ninth Circuit has issued virtually identical opinions granting Payton habeas relief

based on factor (k), whether applying *de novo* review or under AEDPA.

As demonstrated in the Petition, the California Supreme Court faithfully followed and reasonably applied *Boyde*. Pet. at 5-6, 15-20. In doing so, the California Supreme Court considered the prosecutor's erroneous argument as well as the trial court's curative instruction. It simply found those facts insufficient to counter the *unambiguous* factor (k), the other instructions, the correct argument of the defense counsel, and the fact that the only evidence presented at the penalty phase was Payton's potential for being a good prisoner and his religious conversion. Thus, the California Supreme Court's decision was neither "contrary to" nor an "unreasonable application of" clearly established Supreme Court law.

Indeed, even applying *de novo* review, seven judges of the Ninth Circuit agreed with the five justices of the California Supreme Court and likewise found that there was no reasonable likelihood that Payton's jury understood the instructions so as to preclude consideration of his post-crime evidence in mitigation. App. A at 31-41. Thus, even though the Ninth Circuit majority does not agree with the California Supreme Court's decision that there was no constitutional error, "it was at least reasonable" for the California Supreme Court "to conclude otherwise." *Price v. Vincent*, 538 U.S. 634, 123 S. Ct. 1848, 1854-55 (2003). As aptly noted by Judge Tallman in dissent:

> Perhaps I am wrong and the majority is correct that *Boyde* is distinguishable from this case because it concerned pre-crime mitigation evidence. But even so, I am at a loss to understand how the California Supreme Court unreasonably applied any United States Supreme Court precedent. The pre-crime/post-crime mitigation evidence dichotomy offered by the majority is the majority's own untenable invention – not that of the United States Supreme Court. AEDPA commands we show more respect for our counterparts in the California judiciary. We do not have the right to ignore AEDPA, however much our personal sense of justice urges us to over-turn Payton's sentence. We are not Congress. We are not the United States Supreme Court.

App. A at 41.

The Ninth Circuit's repeated refusal to follow the dictates of AEDPA undermines the careful balance that Congress struck when it enacted that law, between the state on the one hand, and the federal courts on the other. A writ of certiorari should therefore issue.

C. The Consequences Of The Ninth Circuit's Decision Ignoring AEDPA And *Boyde* Go Beyond This Case

Also contrary to Payton's assertion, Opp'n at 16-17, the Ninth Circuit's decision has consequences that extend beyond this case. As this and the State's other recent petitions for certiorari attest, the Court's supervisory intervention is urgently needed to correct the Ninth Circuit's consistently unorthodox approach to AEDPA.

Similarly, the Ninth Circuit's restrictive interpretation of *Boyde* has consequences beyond this case. The Ninth Circuit recently granted habeas relief in another death penalty case, *Belmontes v. Woodford*, 350 F.3d 861 (9th Cir. 2003), based on the same unjustified limitation of *Boyde* to pre-crime evidence that *excuses* the crime.[3] Thus, although Belmontes's evidence of good behavior in prison *preceded* the commission of the crime for which the death penalty was being considered (i.e., was *pre-crime*), the Ninth Circuit held that factor (k) did not

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3. A petition for certiorari is to be filed *sub nom. Goughnour v. Belmontes*.

allow for consideration of that evidence because it related to Belmontes's behavior if given life in prison instead of death (i.e., *post-crime*). Under the Ninth Circuit's reasoning, such post-crime or "forward looking" evidence cannot possibly "extenuate the gravity of the crime" because it does not provide an excuse making the defendant less culpable. *Belmontes*, 350 F.3d at 900-02. As noted in the Petition, *Belmontes* is but one of many cases involving this factor (k) instruction and post-crime related evidence in mitigation. Pet. at 21. Certiorari is therefore warranted.

Additionally, the Ninth Circuit's reasoning and holding in *Payton* will be used to require pinpoint instructions concerning mitigating evidence in other cases. Payton disagrees, arguing that the now existing amended factor (k) instruction, directing the jury to consider "any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense," was effectively endorsed by the Ninth Circuit so there is no likelihood of additional instructions being required. Opp'n at 15-16. Payton misses the point. As set forth in the Petition, there are numerous death penalty cases relying upon the same version of factor (k) as used in *Payton*. Pet. at 21. Indeed, in *Belmontes*, notwithstanding a supplemental instruction to factor (k) directing Belmontes's jury to consider any evidence as a basis for a sentence less than death, the Ninth Circuit found there was a reasonable likelihood that the jury believed it could not consider Belmontes's mitigation evidence that he would be a good prisoner. *Belmontes*, 350 F.3d at 901-02. As observed by the dissent in *Belmontes*'s rehearing denial, "[t]he majority has taken a defense *argument* (good pre-trial conduct establishes hope for good future conduct) and elevated it into a *required instruction*. Nothing in the law requires or allows that." *Belmontes v. Woodford*, 359 F.3d 1079, 1087-88 (2004). Thus, the Ninth Circuit has already extended its reasoning to other capital cases. Notably, the supplemental instruction in *Belmontes* was akin to the revised factor (k) and yet the Ninth

Circuit still required an additional pinpoint instruction. Accordingly, this Court's guidance is warranted and urgently needed.

CONCLUSION

The State's Petition for Writ of Certiorari should be granted.

Dated: April 1, 2004

Respectfully submitted,

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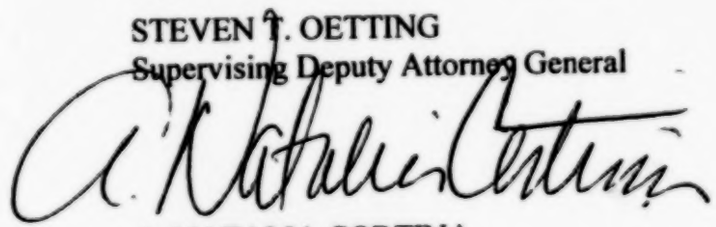

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